In The
SUPREME COURT OF THE UNITED STATES
October Term, 1971

Supreme Court, U. S.
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No. 71-1175

Willodean Forks
Conrad Forks
Kaleen Kehoe
Richard L. Kehoe, Jr.
Stephen M. Kerr
Lynn K. Coyle
William M. Coyle
Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

---

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

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THE REPEAL OF BURNS INDIANA STATUTES, §§48-701 and 48-702, HERE INVOLVED, AS REPORTED AT PAGE 1 OF RESPONDENT'S BRIEF DID NOT APPLY TO LITIGATION PENDING JANUARY 1,1970, INCLUDING THE CASE AT BAR.

The repeal of said sections was part of the City and Town Act of 1969, enacted March 14, 1969, effective January 1, 1970, and was limited as follows:-

> "The repeals consummated by section 8 of this act shall not be construed as affecting any litigation pending at the time this act takes affect nor as an abrogation or impairment of rights, privileges, powers or duties that have vested or may vest on behalf of or against a city or town or any person, firm, association or corporation and each and all of them shall be enforceable to the same effect and subject to the same provisions and limitations as if this act had not become law." (1969 Acts. p. 922).

The sections in the 1969 Act comparable to the Burns Indiana §§48-701 and 48-702 here involved appear infra, pages 7 to 9 inclusive.

RESPONDENT DOES NOT DENY THE ERRORS OF FACT IN THE OPINION BELOW LISTED IN PARAGRAPHS NUMBERED (1), (2), (3), (4) and (6), PAGES 8 to 15 OF THE PETITION.

The Respondent, by complete silence, impliedly concedes the errors of fact in the opinion below as set out in paragraphs (1),(2),(3),(4), and (6) of the "Errors of Fact in Opinion Below" at pages 8 to 15 inclusive of the petition. The accuracy of the said paragraph (6) at pages 12 to 15 inclusive, in setting out the true guidelines for analysis of the petitioners second amended and supplemental complaint, is sufficient in and of itself to require at least a reversal and remand of the case to the trial court for hearing of evidence on the allegations of such complaint. Borden's Farm Products Co. v Baldwin, cited at pages 4 and 26 of the petition. The error of fact in the opinion, that the trial court followed a summary type procedure (pages 7 and 12 of the petition), and the consequent failure to follow the controlling cases of Borden's, supra, Tahir Erk v Glen L. Martin Co., cited at page 13 of the petition, and the Indiana case of Heckler v Conter, Treas., cited and quoted at pages 13 to 15 inclusive of the petition, has contributed to the error in the decision below. Surely the second amended and supplemental complaint, when properly and correctly considered "in the light most favorable" to the Petitioners "with every intendment regarded" in their favor, can not be dismissed on ground of failure to constitute a claim. Tahir Erk v Glen L. Martin Co., supra. The Respondent does deny the paragraph (5) at pages

10 to 12 inclusive of the petition, in regard to "election"; and Petitioners' handling thereof follows next.

IN RE RESPONDENT'S CONTENTION THAT THE REMONSTRANCE PROCEDURE OF §48-702 IS NOT AN ELECTIVE PROCESS, AND DOES NOT CONFLICT WITH THE KRAMER AND CIPRIANO CASES

Such contention appears under paragraph A at pages 2 to 4 inclusive of Respondent's brief; is simply a reiteration of the reasoning of the majority opinion of the Court below. Any reply would be repetition of the whole of the petition for certiorari, to which we respectfully refer the Court.

REPLY TO RESPONDENT'S ANSWER THAT THE STATUTE DID NOT CREATE AN ARBITRARY OR CAPRICIOUS CLASSIFICATION.

Respondent's position here is under paragraph B at pages 4 to 6 inclusive, where the cases of Lindsley v Natural Carbonic Gas Co. (1911), 220 US 61, and Hunter v Pittsburg (1907), 207 U.S. 161, are cited for the first time.

Lindsley merely presents an example of where discrimination may be justified for the purpose of protecting the public. In Lindsley it is stated:

> " * * *. Thus, it may well be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose proscribed.
>
> "These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from

wells penetrating the rock and pumping from those not penetrating it, and between pumping for purpose of collecting and vending the gas apart from the waters and pumping for other purposes. If there be such a difference it justifies the classification for plainly a police law may be confined to the occasion for its existence."

Thus, the classification in Lindsley did have relation to the purpose for which classification was made; but in the statute here involved the exclusion of resident owners of personal property had no relation to the purpose of providing a process by which the question of annexation might be resolved. There is nothing whatsoever to indicate that exclusion of the petitioners from participation in such process was for the public welfare. Compare Morey v Doud (1957)354 U.S. 457, 77 S Ct 1344, 1 L ed 2d 1485, cited in the opinion below, and the minority opinions in the Kramer and Cipriano cases.

In Hunter v Pittsburg, the Pennsylvania statute in question provided for the annexation of a lesser city and intervening land by a greater city by an election held of all the legal voters of both cities and the intervening land. No objection was raised that the statute was in violation of the equal protection of the laws clause. The statute was upheld as against objections other than those involved in Burns §48-702. The statute does serve as an illustration of a reasonable classification and an unobjectionable method of determining whether or not annexation should take place. The right to participate in the election was not made to depend upon

ownership of property of any kind, much less upon ownership of property of a certain type, as it is in the §48-702 here involved.

Thus, neither the Lindsley nor Hunter cases justifies the classification in the Burns Indiana Statutes §48-702, but by way of contrast, each makes clearer the invidious character of the discrimination of the said section.

TWO CONTENTIONS IN RESPONDENT'S BRIEF WERE NOT REFERRED TO IN THE DECISION BELOW. SAID CONTENTIONS ARE AS FOLLOWS:

The First Contention

The first of such contentions is the paragraph II at pages 6 and 7 of such brief to the effect that the first section of the statute (Burns §48-701) would remain in force even though the remonstrance section (Burns §48-702) was stricken. In support of such position Respondent cites Taggart v Claypool (1896), 145 Ind. 590, 44 N.E. 18, and El Paso and N.E.R. Co. v Gutierrez (1909), 215 U.S. 87.

Such contention was made in Respondent's brief in the appeal below where, however, only the Taggart Case was cited. The Taggart case was met by petitioners' reply brief, at pages 19 to 34 inclusive thereof. The rule that "the invalidity of one section of a statute which is in material relation to its other portions so as to modify, restrict, or extend its application will cause the failure of such other portions also" (16 Am Jur 2d 422, n13, Lemke v Farmers' Elevator Co. (1922) 258 U.S. 50, 66 L ed 458, 42 S Ct 250), the general rule that if a proviso

operates to limit the scope of the act in such a manner that by striking out the proviso "the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent" (16 Am Jur 2d 425, n5, Frost v Corporation Com. (1942), 278 U.S. 515, 73 L ed 483, 49 S Ct 235, Ettinger v Studevant (1942), 219 Ind 406, 38 NE 2d 1000), and the rule that "absent a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety or not all" (16 Am Jur 2d 420 n3, Carter v Carter Coal Co. (1936), 298 U.S. 238, 80 L ed 1160, 56 S Ct 855), all apply to the statute in the Taggart case, and the more so to the §§48-701 and 48-702 here involved because of the provisions added in the remonstrance section 48-702 to those of the comparable section of the statute in the Taggart case. In each statute the ordinance section is expressly made conditional upon the provisions of the remonstrance section by the following language:

> " * * * a certified copy of such ordinance shall be conclusive evidence that the territory therein described was properly annexed and constitutes a part of such city, <u>except as provided in the next section."</u> (our underlining). Taggart v Claypool, supra.

The comparable sections 402 and 406 of the City and Town Act of 1969, enacted

March 14, 1969, effective January 1, 1970, are likewise tied together by the following provision of §402, to wit:

> "The annexation ordinance shall become final and binding sixty (60) days after the final publication thereof in the absence of remonstrance and appeal as provided by section 406 of this article." 1969 Acts p 904.

The said sections 402 and 406 appear as §§48-717 and 48-721 in Burns Indiana Statutes, 1971 Supplement, and are respectively as follows:

> "48-717. Annexation of lands by separate ordinance not defining corporate boundaries.-The common council may also, by separate ordinance not purporting to define the entire boundaries of the city, annex contiguous territory, whether platted or not, to the city, and may include such terms and conditions as hereinafter defined, as may be deemed just and reasonable by the common council, and a certified copy of the ordinances shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of the city. The annexation ordinances shall become final and binding sixty (60) day after final publication thereof in the absence of remonstrance and appeal as provided in section 406 (§48-721) of this article. Immediately after the passage of every such ordinance the same shall be published once each week for at least two (2) consecutive weeks in accordance with Chapter 96, Acts of 1927 (§§49-701-49-709), as amended.

(Acts 1969, ch.239, § 402, p. 894.)"

"48-721. Remonstrance against annexation - Procedure.- Whenever territory is annexed to a city, whether by general ordinance defining the city boundaries or by special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five per cent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation within sixty (60) days after the last publication provided for in section 402 (§48-717) of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

"Upon receipt of the remonstrance, the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of sections 406 through 408 (§§48-721-48-723) of this article. In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining

the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.

"Upon the determination of the judge of the court that the remonstrance is sufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper officers of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases. (Acts 1969, ch.239, §406, p.894.)"

The above sections 48-717 and 48-721 indicate, (1), the legislature's intention that the sections are inseparable for the same reasons that the §§48-701 and 48-702 here involved are inseparable, and (2), that the same violation of the equal protection of the laws clause of the 14th Amendment is continued in the new 1969 Acts. Further, the language of the Taggart opinion supporting retention of the ordinance section of the statute in event the remonstrance section was stricken, was in effect, obiter dicta, in view of the court's sustaining of the remonstrance provision on ground that the limitation of right of remonstrance to resident landowners only, while denying such right to non resident land-

owners, presented a reasonable classification; and finally, such obiter dicta of severability in such type of statute was overruled in the case of Ettinger v Studevant (1942), supra, cited and followed in Hayes v Taxpayers Ass. (1947), 225 Ind 242, 72 NE 2d 658; and by the conclusion in the case of Arnholt v City of Columbus (1957), 128 Ind. App. 253, 145 NE 2d 660, wherein the court stated that "annexation to a city is no longer a discretionary act," a conclusion necessarily predicated on the assumed validity of the remonstrance section of the Annexation Act.

Thus, it is clear that the Court below did not consider the severability theory as valid in the statute here involved. The El Paso case of this Court cited by Respondent merely illustrates what may and what may not be severable. In El Paso Congress undertook to control employers' liability compensation in interstate, state, territories and in the District of Columbia. The attempt to include control of such liability in states, as well as in interstate commerce, was so combined as to render the whole of such part of the statute unconstitutional; but as to the part controlling such liability in the Territory of Texas, which was not involved in the question of violation of the Interstate Commerce Clause, there was no impediment to its severability as constitutional. Thus in El Paso there were two separate categories each independent of the other, the one invalid, the other valid. In the statute here in question there is only one cate-

gory, that of annexation subject to the provisions of the remonstrance section 48-702. The statute in the case of Morey v Doud (1957) 354 U.S. 457, 1 L ed 2d 1485, 77 S Ct 1344, cited in the opinion below, is comparable in this, that an invalid exception of a certain corporation from the operation of the statute was held to be inseparable, and the statute therefore was held wholly void as violative of the equal protection of the laws clause of the 14th Amendment.

The Second Contention

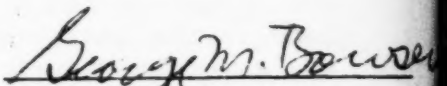
The second of Respondent's contentions not referred to by the Court below, is presented here for the first time, i.e., the contention in the paragraph III on page 7 of the brief, to the effect that petitioners were assured of a court determination of the requisite determinants by reason of the remonstrance to the Ordinance 535 filed by owners of land in the territory sought to be annexed, and that therefore petitioners have suffered no injury. As above stated, such contention was not presented to the trial court or to the Court below. The answer to the contention is, first, that the remonstrance referred to was of a minority of those landowners eligible to remonstrate, as alleged in sub-paragraph (k) of rhetorical paragraph 6 of petitioners' second amended and supplemental complaint here in question (Tr pp 19 to 37 incl.), thereby eliminating, by the provisions of §48-702, the court determination otherwise granted to landowners; and second, equally af-

fected as they are with owners of land in the territory, by annexation, the petitioners, as resident owners of personal property only in the territory, are injured by the denial of the privilege of participating in the proceedings provided by §48-702 in the same manner and degree as the landowners of the territory are permitted to participate. See the majority and minority opinions in the Kramer and Cipriano Cases of the original petition.

CONCLUSION

The petitioners therefore submit that no reason appears for any change in the conclusion of the petition for certiorari at pages 26 and 27 thereof, and pray that the petition be granted.

Respectfully submitted,



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